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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 19 2006

EAC 05 042 50791

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner describes herself as a "doctor, researcher, acupuncturist, massagist." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The director based this finding on regulations relating to physicians seeking to practice medicine in medically underserved areas. The director also found that the petitioner had failed to establish that she meets certain admissibility standards for graduates of foreign medical schools.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.
> > >
> > > (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--
> > > >
> > > > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

> (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

Generally, the controlling regulations for petitions seeking to classify an alien under section 203(b)(2) of the Act are found at 8 C.F.R. § 204.5(k). When an alien seeking classification under that section also seeks a national interest waiver of the job offer requirement, controlling case law can be found in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998). For physicians seeking to practice in designated shortage areas or at facilities operated by the Department of Veterans Affairs (VA), additional regulations are found at 8 C.F.R. § 204.12. These regulations supersede *Matter of New York State Dept. of Transportation* with regard to those certain physicians (but not all physicians in general).

In this proceeding, the petitioner has identified herself as (among other things) a physician engaged in the clinical treatment of patients. The petitioner has not, however, indicated that she seeks to practice medicine in a designated shortage area or at a VA facility. Rather, the petitioner bases her claim more generally on the benefits that, she claims, will accrue from her combined use of standard "Western" medicine and traditional Chinese medicine. Therefore, the petitioner's claim falls under the umbrella of 8 C.F.R. **§ 204.5(k) and** *Matter of New York State Dept. of Transportation.*

In denying the petition, the director did not address the merits of the petitioner's medical claims with respect to *Matter of New York State Dept. of Transportation.* Instead, the director cited numerous requirements found in 8 C.F.R. § 204.12, regulations which apply only to physicians in shortage areas and VA facilities. These regulations do not apply in the present proceeding, and the director erred by applying them to this proceeding. The director essentially denied the petition because the petitioner failed to meet requirements that she did not, in fact, have to meet. At the same time, the director gave the petition no consideration with respect to *Matter of New York State Dept. of Transportation*, which applies to this petition.

The director also found that the petitioner had submitted "no evidence showing that the physician had passed the FLEX, NBMEE, or USMLE examinations." This evidently refers to section 212(a)(5)(B) of the Act, 8 U.S.C. § 1182(a)(5)(B), which indicates that graduates of foreign medical schools are inadmissible to the United States unless they have passed certain competency examinations and other requirements. 8 C.F.R. § 204.12(c)(5) requires evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act. This regulation, however, applies only to alien physicians who intend to practice in an underserved area or at a VA facility pursuant to section 203(b)(2)(B)(ii) of the Act. For other alien graduates of medical schools without certain accreditation, section 212(a)(5)(B) of the Act lists important requirements, but these grounds of inadmissibility are generally of concern at the adjustment stage, rather than at the earlier petition stage to which the present proceeding relates. The director may well deny a Form I-485 adjustment application based on an alien's inadmissibility, but that is typically not a basis for denying the underlying Form I-140 petition. *See Matter of O-*, 8 I&N Dec. 295 (BIA 1959). As explained above, the special provisions at 8 C.F.R. § 204.12(c)(5) do not apply in this case.

Because the denial appears to rest entirely on inapplicable grounds, the director must review the petition and issue a new decision based only on 8 C.F.R. § 204.5(k), *Matter of New York State Dept. of Transportation*, and any other regulations, factors or requirements that demonstrably apply to the petition as filed.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of her position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.